

ORIGINAL

IN THE  
SUPREME COURT OF THE UNITED STATES  
October Term, 1989

No. 90-5796

JIMMIE BURDEN, JR.,

Petitioner,

v.

WALTER ZANT, Warden,  
Georgia Diagnostic and  
Classification Center,

Respondent.

PETITION FOR A WRIT OF CERTIORARI TO  
THE UNITED STATES COURT OF APPEALS  
FOR THE ELEVENTH CIRCUIT

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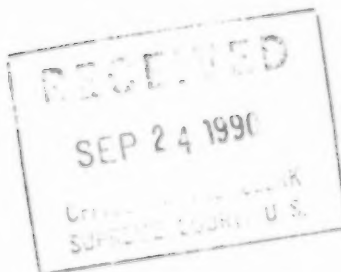
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QUESTIONS PRESENTED

I.

Whether the Court of Appeals below improperly refused to accept, under 28 U.S.C. §2254(d), a state court finding of fact that Dixon, the state's primary witness, had testified at trial under a grant of immunity from prosecution and this improper refusal to accept the state factfinding was determinative of the Court of Appeals' decision.

II.

Whether petitioner, Jimmie Burden, was denied his right to conflict-free, effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where his counsel without petitioner's knowledge also represented, on the same charges, the state's primary witness who testified against petitioner at trial under a negotiated agreement for immunity from prosecution.

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PETITION FOR A WRIT OF CERTIORARI TO  
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Petitioner, Jimmie Burden, Jr., prays that a writ of certiorari issue to review the judgment of the United States Court of Appeals for the Eleventh Circuit.

CITATION TO OPINIONS BELOW

On January 14, 1988, petitioner filed a petition for writ of habeas corpus in the United States District Court for the Middle District of Georgia. The petition was denied on July 12, 1988.

Burden v. Zant, 690 F. Supp. 1040 (M.D. Ga. 1988) (attached as Appendix A to this Petition). The United States Court of Appeals for the Eleventh Circuit issued an order on April 10, 1989, retaining jurisdiction and remanding the case to the district court for an evidentiary hearing on petitioner's conflict of interest claim. Burden v. Zant, 871 F.2d 956 (11th Cir. 1989) (attached as Appendix B to this Petition). An evidentiary hearing was held on June 1, 1989, and the district court issued its findings of facts and conclusions of law in an order dated September 20, 1989. Burden v. Zant, C.A. 88-6-3-MAC (M.D. Ga. Sept. 20, 1989) (attached as Appendix C to this Petition). The Court of Appeals affirmed the district court's denial of habeas corpus relief on May 29, 1990. Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990) (attached as Appendix D to this Petition). Petitioner's petition for rehearing with suggestion for rehearing en banc was denied on September 5, 1990 (a copy of the order is attached as Appendix E to this Petition).

JURISDICTION

The judgment of the United States Court of Appeals for the Eleventh Circuit was entered on May 29, 1990, affirming the district court's denial of petitioner's petition for writ of habeas corpus. Rehearing and rehearing en banc were denied on September 5, 1990. The jurisdiction of this Court is invoked under 28 U.S.C. §1257(3), petitioner having asserted below and asserting herein a deprivation of rights secured by the United States Constitution.

#### CONSTITUTIONAL AND STATUTORY PROVISIONS INVOLVED

Petitioner's case involved the Sixth Amendment to the United States Constitution which reads in part:

In all criminal prosecutions, the accused shall enjoy the right . . . to have the Assistance of Counsel for his defense.

This case also involves Section One of the Fourteenth Amendment which states in part:

No State shall . . . deprive any person of life, liberty, or property, without due process of law. . .

#### STATEMENT OF THE CASE

On August 15-16, 1974, the bodies of Louise Wynn and her three children were recovered from Smith's Pond in Washington County, Georgia. Despite a massive police investigation which involved thousands of police hours and the questioning of several hundred witnesses, the crime remained unsolved some six (6) years later in 1980. Tr. at 449.<sup>1</sup> Furthermore, throughout this investigation Jimmie Burden was never considered a suspect in the crime or implicated in it in any way. Id. at 450.

On May 29, 1980, Jimmie Burden was indicted for an unrelated burglary in which the alleged victim was Acid Dixon's mother. Arrested in Harrington, Delaware, Burden was returned to Georgia on August 3, 1981. That day, Kenneth Kondritzer, the public defender for the Middle Judicial Circuit, was appointed to represent Burden on the burglary charge. On September 16, police arrested Henry Lee Dixon, better known as "Acid" Dixon, and charged him with the Wynn murders. Kondritzer was also appointed

to represent Dixon. While in police custody facing these murder charges, Acid Dixon, for the first time, told a story implicating Jimmie Burden in the deaths while attempting to exonerate himself. Based on Dixon's statement, criminal warrants charging both Burden and Dixon with murder were issued. Kondritzer represented both parties on these charges. Kondritzer moved for and obtained a committal hearing for Dixon.<sup>2</sup>

At the committal hearing, Kondritzer again represented Dixon. The state presented a police officer's testimony that he had a statement from Dixon that exculpated Dixon and provided the sole evidence linking Jimmie Burden to the offenses. (Tr. State Habeas at 20, 92). At the end of the hearing, Kondritzer argued for a dismissal of the charges against Acid Dixon. Prosecutor Malone argued for binding Dixon over. Judge McMillan did not find probable cause to bind the charges against Dixon over to the

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2. Under Georgia law, an unindicted person who has been arrested is entitled to a preliminary or "committal" hearing to determine the existence of probable cause to detain the accused until a grand jury considers the evidence against him. See Ga. Code Ann. §17-7-23(a) (1982).

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1. "Tr." refers to the transcript of record of petitioner's trial.



grand jury;<sup>3</sup> however, Dixon remained in custody under a \$50,000 bond as a material witness. (Tr. Dixon Prelim Hrg. introduced at the district court evidentiary hearing).

After the committal hearing, Kondritzer continued to represent both Dixon and Burden.<sup>4</sup> He visited Dixon in jail and negotiated a deal with Prosecutor Malone that if Dixon testified against Burden "nothing would happen to him." Evid. Tr.<sup>5</sup> 28. The state trial judge, in his mandatory post trial report, specifically found that Dixon testified at trial under a grant of immunity from prosecution. Resp. Ex. 1 at p. 54. See Issue I, infra (a copy of this Trial Judge's Report is attached as Appendix F to this Petition). Dixon's trial testimony and the prosecutor's assertions at trial, as will be set forth in detail

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3. Under Georgia law, this finding of no probable cause did not remove Acid Dixon from danger of prosecution for the murders. "A dismissal of charges based upon lack of probable cause does not bar subsequent indictment and trial of a defendant on the same charges," Boyce v. State, 184 Ga. App. 578, 362 S.E.2d 229, 231 (1987), quoting Callahan v. State, 179 Ga. App. 556, 347 S.E.2d 269 (1986) (cites omitted), because "[t]he decision of the committing court 'settles nothing as to the guilt or innocence of the defendant.'" First National Bank and Trust Company in Macon v. State, 237 Ga. 112, 227 S.E.2d 20 (1976), quoting Hyden v. State, 40 Ga. 476 (1869).

4. Burden was tried on the burglary charges in December, 1981. Kondritzer represented him at trial. The alleged victim of this burglary was Acid Dixon's mother! Evid. Tr. 55-56.

5. "Evid. Tr." refers to the transcript of the evidentiary hearing held by the District Court on June 1, 1989.

later in this petition, also support the fact that Dixon was granted immunity in exchange for his testimony.

Compared to public defender offices in large cities, the system of indigent representation in 1981 for the Middle Judicial Circuit of Georgia was relatively simple. There was a single Public Defender office, located in the small town of Louisville. There were only two attorneys in the office. One of the attorneys, Kondritzer, was the director or "boss". Evid. Tr. at 57. He had as his assistant, Michael Moses, who was hired in 1980 fresh out of law school. Id. at 48. The two attorneys often "switched off" on cases. Id. at 27,28. They also shared a secretary and a single set of case files. Id. at 25. Their responsibilities included representation of all indigents accused of felonies in the five counties in the Circuit. Id.

Once a case was received by the office of the public defender, the two attorneys were essentially interchangeable. Generally they would divide up the cases based on territory (Kondritzer would cover the northern part of the Circuit, Moses the southern part), but on any given day they might handle each other's cases for the sake of convenience. Evid. Tr. at 28.

In fact, Kondritzer and Moses would "switch off" on each other's bargained deals. As Kondritzer testified:

"I'd have some deals worked out in Washington County and we'd switch off and I would go down to Toombs County and plead the defendant out to whatever deal Mr. Moses had worked out ahead of time and he would do the same up in Washington County."

Evid. Tr. at 27-28.

The office of the public defender in the Middle Judicial Circuit was structured as a small law firm. The only difference was that the attorneys did not get to choose their clients and salaries were paid by the government. Kondritzer played the role of managing partner with Moses his junior associate. Under the supervision of Kondritzer, the caseload was divided between the two attorneys with an eye toward maximizing efficiency and economy. In all cases clients were represented by the office and never by one of the two attorneys acting on his own. If an attorney quit, the cases he was handling remained in the office and were taken over by the remaining attorney. The attorneys often conferred on cases and strategy, even if only one attorney at a time would handle a case in court.

On December 31, 1981, Kondritzer resigned from the public defender's office,<sup>6</sup> and Moses, the sole assistant public defender, became the public defender. Burden, 903 F.2d at 1360. Moses assumed responsibility in the representation of both Burden and Dixon. Prior to trial, Moses was told by both Kondritzer and Dixon that an agreement had been reached with the prosecution pursuant to which Dixon would not be prosecuted if he testified at Burden's trial. Evid. Tr. 49, 51. The only fair inference from the record is that it was Kondritzer, Jimmie Burden's lawyer, who secured this immunity agreement for the primary witness against Jimmie Burden.

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6. In his affidavit in the state habeas corpus court, Kondritzer affirmed that he represented Dixon until he left the Public Defender's office. R-1-12-Ex. 2 Affidavit of Kondritzer.

Moses represented Burden at trial. Dixon, who was also represented by Moses at the time of Burden's trial, was the state's primary witness against Burden. Over seven years after the bodies were discovered in Smith's Pond, Jimmie Burden was convicted and sentenced to die<sup>7</sup> on the basis of the almost wholly uncorroborated testimony of Dixon. At the conclusion of the trial, Henry "Acid" Dixon walked out of the courtroom a free man. Jimmie Burden never knew that his own attorneys also represented Dixon, the state's key witness, and had in fact helped secure Dixon's damning testimony for the prosecution.

Jimmie Burden was convicted on the thinnest of possible evidence. There was no physical evidence linking Jimmie Burden to the crime or even to the scene of the crime. The state was so desperate to present any physical evidence to the jury that they went out and bought a replica of the shotgun allegedly carried by Jimmie Burden, and then had none other than Acid Dixon identify it! Tr. at 645, 690.

It stretches credulity beyond the breaking point to believe

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7. Petitioner was convicted of four counts of murder and subsequently sentenced to death on each count on March 4, 1982. On appeal, the Supreme Court of Georgia affirmed the convictions and three of the death sentences; the fourth death sentence was vacated and remanded to the trial court for resentencing to life imprisonment. Burden v. State, 250 Ga. 313, 297 S.E.2d 242 (1982), cert. denied, 460 U.S. 1103 (1983). The conflict of interest issue was properly exhausted in a subsequent state habeas corpus proceeding in the Superior Court of Butts County, Georgia.

that Jimmie Burden committed this crime.<sup>8</sup> The state's theory, provided by Acid Dixon, was that Jimmie Burden was involved in a relationship with Louise Wynn and committed the crimes in a jealous rage. The tiny town of Sandersville, Georgia was descended upon by the best law enforcement team in Georgia; they stayed for two years and investigated extensively enough to arrive at a list of fifteen close contacts of Louise Wynn investigated as suspects. Jimmie Burden was not one of these.

Jimmie Burden was born and raised in Sandersville. His family lives there. Sandersville has only 5,000 residents. It is so small there are only a couple of traffic lights and no McDonalds. It is a tightly-knit community where gossip and rumor spread like wildfire. Everybody in Sandersville and the surrounding communities heard of the tragic crime at Smith's Pond. For two years an expert team of skilled investigators combed this highly charged community in search of evidence; hundreds were interviewed. Yet not one person mentioned the name of Jimmie Burden or even hinted he had any involvement or could have potentially had any involvement in the crime. His name never came up; he was never implicated. As far as the team of investigators and the people of Sandersville were concerned, Jimmie Burden might just as well have been living on the moon when this crime was committed.

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8. Even under the heat of attack and criticism from Burden's post-conviction counsel, Moses, who has more knowledge of the facts of this case than does perhaps anyone else, testified unequivocally at the state habeas hearing: "In my personal opinion, he's an innocent man." State Habeas Transcript (hereinafter "St. Hab. Tr.") 72.

#### HOW THE FEDERAL QUESTIONS WERE DECIDED BELOW

After originally remanding this case for an evidentiary hearing on petitioner's conflict of interest claim, see Burden v. Zant, 871 F.2d 956, 957 (11th Cir. 1989), the Eleventh Circuit Court of Appeals determined that petitioner's Sixth Amendment right to the conflict-free assistance of counsel was not abrogated. Burden v. Zant, 903 F.2d 1352 (11th Cir. 1990).

The Eleventh Circuit held at the outset that due to petitioner's failure to object to the dual representation at the time of his trial, he would have to show that counsel labored under an actual conflict of interest which adversely affected his representation. Id. at 1358. Thus the court applied the standard of Cuyler v. Sullivan, 446 U.S. 335 (1979).

Proceeding under this analysis, the court held that there was no actual conflict of interest. The court reasoned that Kondritzer's representation of Dixon at his committal hearing did not prejudice Burden in any way. Burden, 903 F.2d at 1359. The court also held, contrary to a state court finding of fact, that there was no evidence that Dixon had been granted immunity from prosecution. Id. at 1360. Furthermore, the panel reasoned that since the murder charges against Dixon were dismissed, an actual conflict never developed from Kondritzer's representation of both Dixon and Burden. Id. at 1359.

Concerning petitioner's trial counsel, Moses, the court held that there was no evidence that Moses ever directly represented Dixon and even assuming, arguendo, that Kondritzer's representation of Dixon was imputed to Moses as a member of the



same public defender's office, the conflict of interest did not adversely affect Moses' performance at petitioner's trial. Id. at 1360. Although recognizing that an attorney cannot cross-examine a former client without incurring "divided loyalties," the court held that there was no adverse affect to petitioner's interests because Moses brought out every issue in cross-examining Dixon that a conflict-free attorney would have developed. Id. at 1361.

REASONS THE WRIT SHOULD BE GRANTED

I.

The Court of Appeals below improperly refused to accept, under 28 U.S.C. §2254(d), a state court finding of fact that Dixon, the state's primary witness, had testified at trial under a grant of immunity from prosecution and this improper refusal to accept the state factfinding was determinative of the Court of Appeals' decision.

The United States Court of Appeals for the Eleventh Circuit in its final opinion after remand to the district court stated that no evidence existed that Acid Dixon, the prosecution's chief witness whose uncorroborated testimony provided virtually the only evidence linking Jimmie Burden to the crime, testified under a grant of immunity from prosecution. The opinion stated: "There is no documentary evidence of any sort that attests to Dixon's having received immunity, and [state prosecutor] Malone testified at the district court evidentiary hearing that he did not recall any such agreement regarding immunity." Burden v. Zant, 903 F.2d at 1360. In fact, the entire decision rests upon this premise.

Contrary to this erroneous fact-finding by the Eleventh Circuit, the state trial judge, Superior Court Judge Walter McMillan, after presiding over all proceedings in both Dixon's and Jimmie Burden's cases, in his mandatory post trial report, succinctly found, "Also, Dixon was granted immunity from prosecution and the jury was properly informed of this fact and an appropriate charge was given by the court to the jury." Resp. Ex. 1 at p. 54; App. F at p. 8. This state court finding of fact, entitled to the presumption of correctness, 28 U.S.C. §2254(d), clearly states the reality that until recent court orders was never called into question.

Prior to the evidentiary hearing in the district court, there was no question ever raised concerning the fact that Acid Dixon had been offered a deal in exchange for his testimony. The only question raised at the evidentiary hearing was District Attorney Malone's failed recollection, and Malone clearly conceded that his recollection might be wrong: "Let me make this clear, I do not recall any conversations [with Kondritzer concerning immunity for Dixon]. That is not to say they did not occur. I do not recall them if they did occur." Evid. Tr. at 18-19 (emphasis added). All the other players -- Kondritzer, Moses, and Dixon -- recall the negotiations for Dixon's immunity. Even Malone, closer to the time of the facts at his closing arguments at trial, remembered the deal. It bears repeating: all the parties at some point acknowledged that a deal had been cut.

Prosecutor Malone:

" . . . we may have offered him [Dixon] immunity. I think you realized that we did. I'll tell you that we did."  
Malone's closing argument, Tr. at 911;

Dixon:

Q. [By Moses]: "Now Mr. Dixon, have you been promised anything for your testimony today?"

A. [By Dixon]: "Immunity."  
Tr. at 649;

Kondritzer:

"I remember [Assistant District Attorney Malone] saying, 'I'm not interested in Henry Dixon as long as, you know, if he's going to testify we're not interested in prosecuting him.'"  
Kondritzer, Evid. Tr. at 43; <sup>9</sup>

Moses:

Q. [By Farmer]: "And as far as who worked out the immunity with Mr. Dixon or who worked, if you want to call it in street language, the deal for Mr. Dixon, you don't have any independent memory or independent knowledge of who did that do you?"

A. [By Moses]: "Mr. Farmer, as I believe I told you . . . it's my recollection, I wouldn't -- if somebody could show me different, it could be different, but I believe Mr. Kondritzer did that."  
Moses, Evid. Tr. at 49.

The fact that the deal for immunity was not in writing is irrelevant. However informal the process leading to the deal or however informal the terms of the deal itself, informality cannot

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9. Kondritzer testified that his deal with Malone for immunity was conditioned on Dixon testifying against Jimmie Burden Evid. Tr. at 42-43.

be permitted to obscure the facts: a deal for Dixon was cut.

The district court itself, in its Order recognized,

"[a]fter the committal hearing Mr. Kondritzer had informal discussions with Chief Assistant District Attorney Malone which Mr. Kondritzer remembers resulting in 'an understanding, you know, as long as [Dixon] testified, nothing would happen to him.'" App. C at p. 4.

The fact that Kondritzer was representing irreconcilably conflicting interests when he arranged for one client (Dixon) to receive immunity by providing the state's only evidence against his other client (Jimmie Burden) is not diminished one iota simply because the deal is not in writing.

Under 28 U.S.C. §2254(d),

(d) In any proceeding instituted in a Federal court by an application for a writ of habeas corpus by a person in custody pursuant to the judgment of a State court, a determination after a hearing on the merits of a factual issue, made by a State court of competent jurisdiction in a proceeding to which the applicant for the writ and the State or an officer or agent thereof were parties, evidence by a written finding, written opinion, or other reliable and adequate written indicia, shall be presumed to be correct . . .

The state trial court's written finding that Acid Dixon testified in exchange for immunity from prosecution was entered upon the conclusion of Jimmie Burden's trial at which, of course, the state was fully represented. Federal courts are required to show a "high measure of deference" to such state fact findings.

Sumner v. Mata, 455 U.S. 591, 590 (1982).

The Eleventh Circuit gave absolutely no reason for its refusal to afford the presumption of correctness to the state

court finding of fact. In fact, the Eleventh Circuit made absolutely no mention of the contrary state court fact-finding.

"When Congress provided in §2254(d) that a habeas court could not dispense with the 'presumption of correctness' embodied therein unless it concluded that the factual determinations were not supported by the record, it contemplated at least some reasoned written references to §2254(d) and the state court findings." Sumner v. Mata, 449 U.S. 539, 549 (1981) (emphasis in original). 28 U.S.C. §2254(d)(1-8) provide circumstances under which state fact-findings may not be afforded the presumption of correctness. The Eleventh Circuit made no reference to these circumstances and clearly in this instance none of them apply.

The Eleventh Circuit's erroneous failure to accept the fact of Acid Dixon's immunity infected and was critical to its decision on the conflict of interest issue. In analyzing counsel's dual representation of Dixon and Jimmie Burden the Eleventh Circuit, based on its erroneous fact-finding, held, " . . . Burden can no longer base his conflict of interest claim on the mistaken assumption that the attorney representing him obtained or attempted to obtain immunity for one client in exchange for testimony that was instrumental in the conviction of another." Burden v. Zant, 903 F.2d at 1361.

And, in focusing on the charges against Dixon being dismissed, rather than the fact of Dixon's immunity which the Eleventh Circuit failed to accept, the Eleventh Circuit held, ". . . we have already concluded that the potential conflict of interest lurking in Kondritzer's continued representation of

Dixon and Burden on the same murder charges never materialized because the charges against Dixon were dropped." Burden v. Zant, 903 F.2d at 1360.

Although the §2254(d) presumption of correctness is generally used against habeas corpus petitioners, it applies with equal weight when the state court findings of fact support the claim of a violation of constitutional rights. The Eleventh Circuit had no basis for failing to afford the presumption of correctness to this state court finding of fact which clearly reflected reality.

## II.

Whether petitioner, Jimmie Burden, was denied his right to conflict-free, effective assistance of counsel as guaranteed by the Sixth and Fourteenth Amendments to the United States Constitution where his counsel without petitioner's knowledge also represented, on the same charges, the state's primary witness who testified against petitioner at trial under a negotiated agreement for immunity from prosecution.

The Sixth Amendment to the United States Constitution guarantees a criminal defendant the right to counsel, including the right to effective assistance of counsel free of conflicts of interest. In the case of a single attorney representing multiple defendants, the attorney must be free from conflicting interests which might arise in the zealous representation of each codefendant. Wood v. Georgia, 450 U.S. 261, 271 (1981). There are two separate and distinct tests under which a conflict of interest claim may be assessed.

When an attorney represents multiple defendants who face the same charges, the potential for a conflict of interest naturally



develops. In fact, it is inherent in "almost every instance of multiple representation." Cuyler v. Sullivan, 446 U.S. 335, 348 (1979). If a defendant or his counsel objects at trial to the joint representation, the court must conduct an inquiry into the possibility that a conflict might exist. It violates the Sixth Amendment for a trial judge to fail to respond adequately to such an objection. Under these circumstances, there is no need for the defendant to demonstrate that the conflict of interest had any adverse impact on his attorney's representation. Holloway v. Arkansas, 435 U.S. 475 (1978).

On the other hand, if no objection is made at trial, a defendant whose lawyer represented potentially conflicting interests can still establish that his Sixth Amendment right to the effective assistance of counsel was violated if he can satisfy the two-prong test articulated in Cuyler v. Sullivan. First, he must demonstrate that his lawyer labored under an actual conflict of interest. Second, he must demonstrate that this actual conflict of interest adversely affected his lawyer's performance. Cuyler v. Sullivan, 446 U.S. at 348. Once an actual conflict of interest adversely affecting counsel's performance is established, prejudice is presumed. Id. at 349-50. ("[A] defendant who shows that a conflict of interest actually affected the adequacy of his representation need not demonstrate prejudice in order to obtain relief.").

In sum, there are two different standards under which a defendant whose counsel labored under a conflict of interest may obtain relief, the choice of which depends upon whether or not

the defendant objected to the multiple representation at trial. First, if an objection was made at trial but the trial judge responded to it inadequately, then relief does not depend on the defendant's ability to show adverse impact (Holloway's "objection" standard). Second, even if no objection was entered, relief may still be obtained if the defendant shows that the conflict adversely affected his attorney's representation of his interests (Cuyler's "no objection" standard).

1. The Court of Appeals erroneously required petitioner to establish an adverse effect created by his attorney's conflict of interest when he was unable to object to the conflict at trial.

The Court of Appeals erroneously deployed the more stringent "no objection" test of Cuyler to petitioner's conflict of interest claim. Under the facts of this case, Burden's claim should have been assessed under the more lenient "objection standard" articulated in Holloway. At no time was Jimmie Burden aware that his attorneys were, while representing him, also representing "Acid" Dixon, the state's primary witness against him in this capital case.<sup>10</sup> Yet because this multiple representation was never brought to his attention, Burden was logically unable to raise any objection at trial. Although both his attorney and the trial judge knew about the conflict, neither discharged their obligation to inform Burden about the dual

<sup>10</sup>. While the court of appeals thought it was unclear whether or not Burden realized that Kondritzer was representing Dixon, the district court's opinion is silent on that matter. The record is, however, uncontroverted: Burden never knew that both Kondritzer and Moses were actively representing "Acid" Dixon. See Verified Petition for Writ of Habeas Corpus.



representation. Because he failed to bring his conflict of interest to the court's attention, Burden's trial counsel violated his ethical duty, "upon discovering a conflict of interest, to advise the court at once of the problem." Holloway v. Arkansas, 456 U.S. 476, 485-86 (1978); see also Cuyler v. Sullivan, supra, at 346 ("Defense counsel have an ethical obligation to avoid conflicting representations and to advise the court promptly when a conflict of interest arises during the course of trial.").

Nor did the court ever conduct any inquiry into the potential threat this conflict posed to Burden's defense. Although there is generally no requirement that trial courts initiate inquiries concerning conflicts of interest due to multiple representations, special circumstances, such as where the court knows or reasonably should know a conflict exists, create the duty to inquire. Cuyler v. Sullivan, at 346-47. Judge McMillan, the Chief Judge of the Circuit, appointed the same public defender's office to represent both Jimmie Burden and Acid Dixon; he also presided both at Jimmie Burden's trial and at Acid Dixon's committal hearing. Judge McMillan knew, or reasonably should have known, that Burden's counsel was laboring under a conflict of interest. Id. Yet he failed to conduct any inquiry into the conflict and at no time did he advise Burden that the same public defender's office was representing the prosecution's chief witness against him. St. Hab. Tr. at 28, 30, 58, 94; see also the transcripts of the Unified Appeal Proceeding of Jan. 21, 1982, motion hearing and trial.

Trial court judges are obligated "affirmatively [to] advise the defendant[] that joint representation creates potential hazards which the defendant[] should consider before proceeding with the representation." Cuyler v. Sullivan, supra, at 352. "Whenever two or more defendants who have been jointly charged . . . are represented by the same attorney, the trial judge should inquire into potential conflicts which may jeopardize the right of each defendant to the fidelity of his counsel." Id. at n.2 (quoting ABA Project on Standards for Criminal Justice, Function of the Trial Judge §3.4(b) (App. Draft 1972)). The Eleventh Circuit, focusing mainly on trial counsel Moses' conduct, never once mentioned Judge McMillan's failing. Because Jimmie Burden never knew that his lawyer was representing the prosecution's chief witness against him, he never had the chance to object to his lawyer's conflict of interest.<sup>11</sup> His attorney and the trial judge were fully aware that a conflict or potential conflict had been engendered, but did not inform him.

As was previously noted, under Holloway, a conflict of interest claim is subject to a lower standard of proof when the trial judge, once informed of the conflict, conducts an inadequate hearing on the issue. It necessarily follows, however, that the prejudice must be compounded when, as in Burden's case, he received no hearing whatsoever because both his counsel and the trial judge -- both of whom were fully aware of

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11. Exacerbating the situation is the fact that Jimmie Burden is a person of very low intelligence who cannot read, write or express himself very well. St. Hab. Tr. at 71.

the conflict -- neglected to disclose the problem to him. This being so, Jimmie Burden's conflict claim should be subject to a standard no higher than if he had objected to the conflict at trial and his objection had not been given an adequate hearing.<sup>12</sup> Nonetheless, the Court of Appeals assessed Burden's conflict claim under Cuyler's "no objection" standard. The court offered no reason why this higher hurdle and not the lower one was more appropriate under these unusual circumstances. For this reason, certiorari should be granted.

2. The Court of Appeals erred in holding that petitioner's counsel did not labor under an actual conflict of interest which adversely affected their ability to represent him.

Even if the more demanding "no objection" standard is imposed, the record clearly indicates that petitioner is still entitled to relief. The Court of Appeals' assessment of the facts is unjustifiably myopic. Most importantly, its conclusions resolutely from a distorted and cramped understanding of the immunity from prosecution arranged for Dixon. Once the court endorsed this erroneous interpretation of the facts (see Issue I, supra), it was able in one fell swoop to absolve both Kondritzer and Moses of laboring under a conflict of interest. Conversely,

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12. The "objection" standard ordinarily applies to the context on which a single lawyer is representing two clients at trial. In this situation, the clients can quite literally see that the same attorney is representing them. On these unusual facts, however, Burden would not know there was a conflict unless facts someone told him about it. They did not.

once the immunity deal is properly understood and appreciated, it is plain that the conflict of interest crippled both of Burden's attorneys.

First, the court held that no immunity whatsoever had been arranged for Dixon. Burden v. Zant, 903 F.2d at 1360. Such an assertion cannot withstand a review of the record. It has been admitted by all parties at some time that a deal was entered into. All the relevant actors knew about it and were prepared to see to it that each side discharged its part of the bargain. All the relevant actors acknowledged that Dixon would not be prosecuted if he testified against Burden. See p. 13, supra.

Moreover, the deal's effect was clear: Dixon "was released the moment he testified." Moses, St. Hab. Tr. 65. Dixon, in other words, received the benefit of his bargain.

Despite this evidence, the Court of Appeals held that:

The impression of a witness that he would not be prosecuted as long as he testified does not establish a grant of immunity -- formal or informal. And [sic] informal discussion that results in a defense attorney's understanding of the prosecution's current intentions is not negotiation of immunity.

Burden v. Zant, 903 F.2d at 1360. In State v. Hanson, 295 S.E.2d 297 (1982), the Georgia Supreme Court, when interpreting a non-prosecution agreement between the state and the defendant Hanson, said: "While a slavish adherence to contract law should be avoided, we find that analysis of the present agreement as a contract between the prosecutor and Hanson is useful." See also Smith v. State, 74 Ga.App. 777, 41 S.E.2d 541, 547 (1947) ("[O]n the ground of public policy, it has been uniformly held that a

State may contract with a criminal for his exemption from prosecution.") (quoting Ingram v. Prescott, 111 Fla. 320, 149 So. 369 (1933)). So to the extent that Georgia law requires the existence and content of a non-prosecution agreement to be construed in accordance with general principles of contract law, it should be clear that Kondritzer had indeed reached an agreement with Malone not to prosecute Dixon in exchange for his testimony. As was noted previously, all the parties to the agreement have openly conceded as much. Furthermore, however informal the process leading to the deal or however informal the terms of the deal itself, informality cannot be permitted to cloud the fact of the matter: a deal for Dixon was secured. After his testimony, which is the almost completely uncorroborated basis of petitioner's convictions and death sentences, Dixon walked away a free man.

The important inquiry in this case is how the deal undermined petitioner's representation. Only after the immunity deal is placed in proper perspective can Burden's conflict claim be fairly assessed under Cuyler's "no objection" standard. For once the impact of the deal is appreciated, it is impossible to credit the Eleventh Circuit's determination that Burden's counsel did not labor under an actual conflict of interest which adversely affected their performance.

First, both Kondritzer and Moses labored under an actual conflict of interest. The court unjustifiably minimized Kondritzer's role in the entire affair, even though it was Kondritzer who inflicted the initial (and most severe) damage on

Burden's defense by negotiating the immunity agreement and thereby setting the stage upon which Moses was later obliged to maneuver. Kondritzer began representing both Burden and Dixon on the murder charges in mid-September. Kondritzer represented Dixon at his committal hearing. Although the court found -- and Kondritzer argued -- that there was no probable cause to hold Dixon on the murder charge, he was nonetheless bound over as a material witness. Evid. Tr. 34. Kondritzer conceded that he continued actively to represent Dixon after his committal hearing. Although the court suggested in effect that Kondritzer was not simultaneously representing Burden and Dixon on the murder charges, Burden v. Zant, 903 F.2d at 1359, this finding is implausible. It is beyond dispute that Kondritzer arranged for Dixon's immunity on the murder charges after he had begun representing Burden on the burglary charge and after warrants had been issued for Burden's arrest on the murder charges. Once this deal was in place, it was Kondritzer's obligation, as Dixon's attorney, to insure that both the state and Dixon discharged their respective parts of the bargain. Moreover, Kondritzer's representation of Dixon did not cease when no probable cause could be found to hold Dixon on the murder charges.<sup>13</sup> On the contrary, Kondritzer arranged the immunity deal and continued to visit Dixon in jail in order to discuss his plight and to keep him abreast of "what was going on." Evid. Tr. 28-29. Kondritzer

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13. Furthermore, Dixon could still have been directly indicted. See fn. 3, supra. Certainly had he not testified against Jimmie Burden, he would have been.



was, in short, obligated to insure that the agreement yielded its intended benefits for Dixon, benefits which would be forthcoming only when he testified against Burden. No conflict could be more painfully clear, or, from where Jimmie Burden waits on death row, more lethal.

In a case that is factually very similar to this case, Hoffman v. Leeke, 903 F.2d 280 (4th Cir. 1990), the Fourth Circuit held that there was an actual conflict of interest. In Hoffman, the petitioner was convicted of being an accessory before the fact to murder for his role in a murder for hire scheme against his spouse's boyfriend. The evidence at trial showed that the murder was committed by a hired killer recruited by Hoffman's brother-in-law, George Moose, at Hoffman's request. Moose was the first person arrested during the murder investigation. Hoffman retained an attorney, J. M. Long, to represent Moose, and after being questioned several times himself during the investigation, Hoffman retained Long to represent himself as well. Id. at 282. Hoffman was subsequently arrested on the accessory charges. The day after his arrest, Long negotiated a verbal plea agreement for Moose, in which he agreed to testify for the state at Hoffman's trial in return for a reduced sentence.<sup>14</sup> Moose was the key prosecution witness against Hoffman. Id. at 283. The Fourth Circuit held that there was an actual conflict.

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14. Long was also retained by Kathy Danielson, who was the girlfriend of the paid killer. Long also negotiated a plea agreement in which she agreed to testify against Hoffman.

It is difficult for us to understand, and indeed we do not, how advising one client to give a statement and testify to the essential elements of a crime allegedly committed by a second client is not a conflict of interest. From the outset of Long's representation of Hoffman, a conflict was patent. While representing Hoffman, Long advised Moose to give a statement which implicated Hoffman, and to agree to testify against Hoffman as part of a plea agreement. Hoffman was in the unacceptable position of having his attorney help the state procure a witness against him. There was at this point an actual conflict of interest.

Id. at 286. The court also found that the conflict of interest adversely affected petitioner's counsel, since counsel was unable to cross-examine the state's key witness, who was also represented by petitioner's counsel.

To cross-examine Moose effectively, Long would have had to question his own client's truthfulness. This he could not do.

Id. at 287. It is clear from the record in this case that trial



counsel Moses was faced with this same problem at Jimmie Burden's trial.

Another very similar case is Fitzpatrick v. McCormick, 869 F.2d 1247 (9th Cir. 1989). In Fitzpatrick, a death-sentenced inmate was represented on retrial by the same attorney who represented a co-defendant at the original trial on the same charges. Both defendants claimed innocence and placed the blame on the co-defendant. Thus the two defense theories were in direct conflict. Id. at 1252. The Ninth Circuit held that there was an actual conflict which adversely affected the attorney's representation of Fitzpatrick.

Therefore, born when Kondritzer agreed to represent both Dixon and Kondritzer, the conflict grew when Kondritzer arranged immunity for Dixon. When Kondritzer procured Dixon's non-prosecution, he at the same time sacrificed his ability effectively to represent Burden. The conflict continued to fester when Kondritzer oversaw the agreement's execution in order to guarantee that both sides respected its terms. Because the Eleventh Circuit seemed more concerned to assess Burden's conflict claim in relation to Moses' conduct, it downplayed the central role which Kondritzer played in igniting the conflict.

The court of appeals also overlooked how the immunity deal, once in place, generated an untenable position for Moses. The court tried artificially and unrealistically to seal Kondritzer's initial conduct from Moses' later representation. Burden v. Zant, 903 F.2d at 1360. The two were, however, intimately and inextricably connected. When Moses succeeded Kondritzer as chief

public defender, he inherited Kondritzer's obligation to insure that Dixon fulfilled his promise to testify against Burden.<sup>15</sup> Before and during Jimmie Burden's trial, Moses was therefore operating under two patently conflicting obligations. He was, on the one hand, obligated to insure that Dixon provided severely incriminating testimony against Jimmie Burden. On the other hand, he was at the same time obligated to provide Jimmie Burden with the best defense he could muster.

Second, there can be little doubt that this actual conflict adversely affected both Kondritzer's and Moses' ability to represent Burden. A pre-trial and trial strategy designed to secure the only incriminating evidence against a defendant is perfectly appropriate for the prosecution. It is, however, utterly inappropriate as a defense strategy: it is not a defense at all, and it is profoundly incompatible with the defense attorney's duty of loyalty to his client. Once Kondritzer sealed the bargain with the state on Dixon's behalf, he foreclosed any possibility that a similar bargain might be secured for Burden. And because Dixon's testimony was not only so damning, but also

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15. Representation of two persons charged in the same offense by two members of the same firm is sufficient to establish a conflict of interest. See, e.g., United States v. Flannagan, 679 F.2d 1072 (3rd Cir. 1982); Ross v. Heyne, 638 F.2d 979, 983 (7th Cir. 1980); Zuck v. Alabama, 588 F.2d 436, 438 (5th Cir. 1979); United States v. Donahue, 560 F.2d 1039, 1042 (1st Cir. 1977).

the only real evidence against Jimmie Burden,<sup>16</sup> sealing the deal for Dixon for all practical purposes sealed Burden's fate as well.

Moses' representation was likewise impaired. Unlike counsel who owed no loyalty to Dixon, Moses was unable to pursue any pretrial or trial strategy devised to discourage Dixon from testifying against Burden in the first place. Any effort Moses might have undertaken in this direction would have directly violated his duty to assist Dixon. Had separate counsel represented Dixon, and had Dixon decided not to testify, or to modify his testimony in favor of Burden, Moses would have been under no obligation to persuade Dixon otherwise. In fact, his duty of loyalty to Jimmie Burden would have required him not to do so. Finally, though the Eleventh Circuit found Moses' cross-examination of Dixon at Burden's trial adequate, Burden v. Zant, 903 F.2d at 1361, this assessment of Moses' performance overlooks an obvious failing: Moses never in his cross-examination suggested in the jury's presence that Dixon, not Burden, was in fact the murderer. It is precisely this inability to pursue viable avenues of defense that makes joint representation suspect. Holloway, at 490.

[I]n a case of joint representation of conflicting interests the evil -- it bears repeating -- is in what the advocate finds himself compelled to refrain from doing, not only at trial but also as to possible pretrial plea negotiations . . . .

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16. Without Dixon's testimony, Jimmie Burden would clearly have been entitled to a directed verdict.

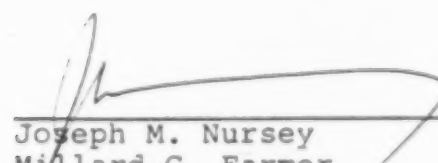
Id. Had the possibility that Dixon was the real murderer been starkly and straightforwardly presented to the jury, its judgment may well have been different.

Because they played a crucial and consistent role in procuring Dixon's testimony against Jimmie Burden, both Kondritzer's and Moses' ability to represent Burden effectively was adversely affected. Indeed, it is difficult to imagine an effect on representation more adverse than the effect of having defense counsel labor under the duty to secure incriminating testimony for one client against another. For this reason as well, certiorari should be granted.

#### CONCLUSION

For the foregoing reasons, the writ of certiorari should be granted.

Respectfully submitted,



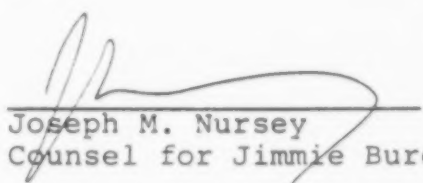
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CERTIFICATE OF SERVICE

I hereby certify that a copy of the foregoing pleading has been served on counsel for the opposing party by United States Mail with adequate first-class postage attached thereon to: Ms. Paula Smith, Assistant Attorney General, State of Georgia, 132 State Judicial Bldg., 40 Capitol Square, S.W., Atlanta, GA 30334.

This 21st day of September, 1990.

  
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